Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

JAMES PHELAN

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a white employee complaining of race discrimination under Title VII establish "background circumstances" to show that the employer "has reason or inclination to discriminate against whites" as an essential element of the employee's prima facie case of race discrimination?

2. May an employer, consistent with the Family and Medical Leave Act, 29 U.S.C. §2901 et seq., refuse to reinstate an employee, who has been granted leave under the Act, to his or her former position because the employer believes that the business ran smoother while the employee was on leave?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 21, 2003.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-10) is reported at 347 F.3d 679. The opinions of the district court (App. 13-41, 42-53) are reported at 125 F.Supp.2d 870 and 226 F.Supp.2d 914.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on October 21, 2003. (App. 11.) Rehearing was denied on November 21, 2003. (App. 12.)

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, which, in 42 U.S.C. §2000e-3(a), makes it unlawful

> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, sex, religion, sex, or national origin

This case also involves the "restoration to position" provision of the Family and Medical Leave Act, 29 U.S.C. § 2614(a)(1), which provides as follows:

> (1) In general
>
> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other conditions of employment.

STATEMENT

Petitioner James Phelan was hired by respondent City of Chicago to be a "Ward Superintendent" in November 1, 1995.[1] Petitioner was viewed as a "hard working" ward superintendent by the ward's alderman and each year received a merit salary increase.

In the summer of 1997, petitioner began to experience serious personal health problem; on September 10, 1997, respondent granted petitioner a leave of absence under the Family and Medical Leave Act, 29 U.S.C. §2601 et seq.

Petitioner was indicted on mail fraud charges on September 30, 1997.[2] The indictment did not involve any allegation of misconduct related to plaintiff's employment with the City.

Petitioner's physician released him to return to work in October of 1997. On October 16, 1997, respondent simultaneously reinstated petitioner from his FMLA leave and fired him.

Petitioner thereafter filed two actions in the district court: in the first case, petitioner alleged *inter alia* that he been filed in violation of the FMLA. In the second action, filed after issuance of a "right to sue" notice from the Equal Employment Opportunity Commission, petitioner alleged that

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1. The "Ward Superintendent" is in charge of garbage collection for one of the fifty wards that comprise the City of Chicago.

2. Petitioner was subsequently acquitted.

he had been fired because he had been indicted and that respondent would not have fired a similarly situated African-American or Hispanic ward superintendent.

The district court dismissed on a Rule 12(b)(6) motion all of petitioner's claims save for his race discrimination claim. (App. 13-24.) Thereafter, respondent moved for summary judgment on the discrimination claim

In seeking to explain its decision to discharge petitioner, respondent asserted in its summary judgment motion that it had concluded while plaintiff was on FMLA leave that the ward operations were running smoother under the supervision of petitioner's replacement.[3] Respondent denied that petitioner's indictment had any impact in its decision to fire petitioner.

Petitioner opposed the motion for summary judgment with evidence that, before his indictment, he had viewed as a

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3. Respondent also supported its summary judgment motion with deposition testimony from a supervisor that he had "written up" petitioner for using his personal vehicle and had recommended a three day suspension. Petitioner disputed this testimony with his denial that he had ever been "written-up," and pointed out first, that respondent was unable to produce any "write-up" and second, that the supervisor had admitted at his deposition that the "write-up" had not resulted in any discipline. The Seventh Circuit did not base its decision on any "write-up," but mistakenly observed (App. 6) that petitioner "was ultimately suspended for three days due to similar problems prior to taking his medical leave." This contention had not been urged by respondent and is without support in the record.

hard working employee and that he had repeatedly received merit raises. Petitioner also came forward with evidence that respondent had not fired an African-American employee who had been charged with a serious crime, but had instead permitted that employee to be on unpaid leave until the criminal case was resolved and had then reinstated the employee on a favorable termination of criminal proceedings.

The Seventh Circuit upheld the district court's dismissal of petitioner's FMLA claim,[4] (App. 5-7), and affirmed the grant of summary judgment without reaching petitioner's arguments that the district court had improperly resolved disputed questions of fact. Instead, the Court of Appeals held that petitioner had failed to meet the burden imposed on white discrimination plaintiffs to prove "background circumstances" showing that respondent "has reason or inclination to discriminate invidiously against whites." (App. 8.) The Court of Appeals rejected petitioner's argument that this "background circumstances" requirement "imposes an unfair burden to non-minority plaintiffs since a non-minority

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4. Petitioner argued on appeal that he was entitled to summary judgment on his FMLA claim because respondent had represented that it had fired petitioner because while he was on FMLA leave, it became apparent that things ran smoother without him. The Seventh Circuit mistakenly characterized this argument as a "concession" by petitioner that he had been "terminated because of the poor quality of his work." (App 6.) Petitioner made no such concession, and has asserted throughout this litigation that he was fired because had been indicted on non-work related charges and that respondent would not have fired a similarly situated African-American employee.

plaintiff must establish more facts to create the *prima facie* case." (App. 8.)

REASONS FOR GRANTING THE WRIT

-I-

This case provides the Court with an opportunity to resolve the conflict among the circuits about the proper standard of proof in cases of employment discrimination brought by white plaintiffs.

Title VII of the Civil Rights Act of 1964 protects persons of all races from discrimination.[5] The basic framework to establish a *prima facie* case of disparate treatment is set out in the four factor test of *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973).

Five circuits require a white person complaining of race discrimination under Title VII to establish the four factors of *McDonnell-Douglas* plus "background circumstances" that the "defendant is that unusual employer who discriminates against the majority."[6]

Three circuits have rejected a heavier burden for white plaintiffs, reasoning that "[d]iscrimination is discrimination no matter what the race, color, religion, sex, or national

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5. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 279 (1976).

6. *Parker v. Baltimore & O.R. Co.,* 652 F.2d 1012, 1017 (D.C.Cir. 1981). See, e.g., *Sutherland v. Michigan Dept of Treasury,* 344 F.3d 603, 614 (6th Cir. 2003); *Mills v. Health Care Service Corp.,* 171 F.3d 450, 457 (7th Cir. 1999); *Gagnon v. Sprint Corp.,* 284 F.3d 839, 848 (8th Cir. 2002); *Mattioda v. White,* 323 F.3d 1288, 1292 (10th Cir. 2003).

origin of the victim."[7]

The Court should resolve this conflict among the circuits.[8]

None of the circuits that apply the "background circumstances" test apply it in sex discrimination cases, where males and females have the same burden of proof. See, e.g., *Lautermilch v. Findlay City Schools,* 314 F.3d 271, 275 (6th

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7. *Bass v. Board of County Commissioners,* 256 F.3d 1095, 1103-04 (11th Cir. 2001). See, e.g., *Iadimarco v. Runyon,* 190 F.3d 151 (3d Cir. 1999); *Byers v. Dallas Morning News, Inc.,* 209 F.3d 419, 426 (5th Cir. 2000).

8. This issue does not appear to have arisen in the First Circuit and was reserved by the Ninth Circuit in its unpublished opinion in *Teehee v. Board of Education,* 116 F.3d 486 (table), 1997 WL 312222 (9th Cir. 1997). *See Lemnitzer v. Philippine Airlines, Inc.,* 816 F.Supp. 1441, 1448 (N.D.Cal. 1992) (refusing to apply "background circumstances" test).

   District courts in the Second and Fourth Circuits have reached conflicting results:

   Second Circuit: *Olenick v. New York Telephone,* 881 F.Supp. 113, 114 (S.D.N.Y. 1995) (adopting "background circumstances" test); *Ticali v. Roman Catholic Diocese of Brooklyn,* 41 F.Supp.2d 249, 260-262 (E.D.N.Y. 1999) (rejecting "background circumstances" test);

   Fourth Circuit: *Green v. Clarendon County School District,* 923 F.Supp. 829, 840 (D.S.C. 1996) (requiring "background circumstances"); *Stock v. Universal Foods Corp.,* 817 F.Supp. 1300, 1306 (D.Md. 1993). ("background circumstances" not required).

Cir. 2003); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 919 (7th Cir. 2001) *Schoffstall v. Henderson,* 223 F.3d 818, 825 (8th Cir. 2000); *Babbar v. Ebadi,* 216 F.3d 1086 (Table), 2000 WL 702428 (10th Cir. 2000). A similar equality should be applied to race discrimination cases.

Petitioner came forward with evidence that he had been a hard working ward superintendent and that he had repeatedly received merit raises. Petitioner asserted that he had been fired because he had been indicted and presented evidence that defendant had not discharged a similarly situated African-American ward superintendent who had been charged with a serious crime. Petitioner also presented evidence that defendant's stated reason for his discharge was false. But for the decision of the Seventh Circuit to apply the "background circumstances" rule, petitioner would have been entitled to present his race discrimination claim to a jury.

Title VII only requires that the plaintiff prove that the employer "is treating some people less favorably than others based upon a trait that is protected under Title VII." *Iadimarco v. Runyon,* 190 F.3d 151, 161 (3d Cir. 1999), The "background circumstances" rule applied in this case interferes with the remedy created by Title VII. Certiorari should be granted to resolve the conflict among the circuits about this addition to the *McDonnell-Douglas prima facie* case.

-II-

The decision of the Seventh Circuit reduces the right to reinstatement of the Family and Medical Leave Act, 29 U.S.C. §2601, to mere precatory language.

A core provision of the FMLA is Section 2614(a)(1), which requires that "[u]pon the employer's timely return, the employer must reinstate the employee to his or her former position or an equivalent." *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 86 (2002). The plain, every day meaning of this provision is that an employee is free to take

leave without fear that the employer will conclude that things run smoother without that employee. The decision of the Seventh Circuit in this case reads this provision out of the FMLA.

In this case, respondent conceded that it was because petitioner had availed himself of FMLA leave that respondent concluded that petitioner should be replaced. According to respondent, while petitioner was on medical leave it became apparent that his replacement "would be more efficient and effective as the Ward Superintendent in the 23rd Ward," and that there would be "fewer problems in the Ward" if petitioner was replaced.[9]

We recognize that an employee on FMLA leave does not gain immunity from being discharged; thus, an employee who would have been laid off during a reduction in force is not entitled to any special treatment because she was on FMLA leave at the time of the layoff. *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000). The question presented in this case is whether an employee may take FMLA leave free of fear that the employer will conclude, as respondent did in this case, that things run smoother without that employee.

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9. Respondent did not, however, choose the temporary replacement as the permanent ward superintendent after it discharged petitioner.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

February, 2004

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3862

JAMES PHELAN

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 40 —**Ian H. Levin** *Magistrate-Judge.*

Argued September 12, 2003—Decided October 21, 2003

Before Bauer, Kanne and Evans, Circuit Judges.

Bauer, Circuit Judge. The plaintiff James Phelan brought suit after being dismissed from his position of "ward superintendent" by the City of Chicago. Phelan claimed that the City 1) violated the Due Process Clause, 2) breached the Family and Medical Leave Act, and 3) violated Title VII of the Civil Rights Act. The district court granted the City's motion to dismiss Phelan's first two causes of action and disposed of the third on summary judgment. Phelan appeals. We affirm.

BACKGROUND

Phelan was employed in two separate positions by the City of Chicago. In 1992 he was hired by the City as a police officer. In October 1993 the Chicago Police Department granted him a leave of absence. In November 1995, while he was on leave from the Police Department, Phelan was hired by the City's Department of Streets and Sanitation to work as

ward superintendent for the 23rd Ward. Phelan worked full time as ward superintendent until July 1997 at which time he took leave because of personal health problems. Phelan exhausted all of his sick days but was still unable to return to work. In September 1997, he applied for and was granted leave under the Family and Medical Leave Act ("FMLA").

In September 1997 Phelan was indicted for mail fraud. Shortly after his indictment, City personnel requested that he resign. When he refused to resign, the City fired him. Phelan's discharge was processed the same day that he officially returned from his FMLA leave. On October 27, 1997, Phelan requested that the City reinstate him to his position as a probationary police officer. The City notified Phelan that he no longer had employment with the Police Department. Phelan then filed suit.

ANALYSIS

This court reviews the district court's granting of motions to dismiss the Due Process and FMLA claims under a de novo standard of review. *See Hickey v. O'Bannon,* 287 F.3d 656, 657 (7th Cir. 1999). In reviewing the district court's decision, this court must accept all well-pleaded facts alleged in the complaint as true and must draw all reasonable inferences in favor of the non-movant. *Lachmund v. ADM Investor Servs., Inc.,* 191 F.3d 777, 782 (7th Cir. 1999). A motion to dismiss will succeed when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Similarly, this court reviews the district court's dismissal of the Title VII claim via summary judgment de novo. *Grayson v. City of Chicago,* 317 F.3d 745, 749 (7th Cir. 2003). All facts will be viewed in a light most favorable to the non-moving party, and summary judgment will be upheld if there is no genuine issue of material fact. Id.

III. Due Process Claim

Phelan claims that the City's termination of his employment violated his Fourteenth Amendment Due Process rights when the departments terminated him from his positions as ward superintendent and police officer without notice or a hearing. The Fourteenth Amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1. In order to assert a violation of the Due Process clause, a plaintiff must be able to show that 1) he or she had a "property interest" and 2) that he or she was deprived of this interest without due process of law. *Bishop v. Wood,* 426 U.S. 341, 343 (1976).

In the employment context, a property interest can be created in one of two ways, "1) by an independent source such as state law securing certain benefits; or 2) by a clearly implied promise of continued employment." *Shlay v. Montgomery,* 802 F.2d 918, 921 (7th Cir. 1986) (quoting *Munson v. Friske,* 754 F.2d 683, 692 (7th Cir. 1985)), *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Phelan is unable to state that he has any interest in his employment via the first method for creating a property interest. In his pleadings, Phelan bases his claim to a property interest on sections 2-100-110 and 2-74-060 of the Municipal Code. These sections state the applicable procedures for termination of "career service" employees. Unfortunately for Phelan, his employment in the capacities of a police officer and a ward superintendent are not classified as "career service" positions; rather they are "exempt" and not entitled to any procedures for dismissal. R.74 at Exh. K pars.3, 5. Specifically, the Municipal Code distinguishes "career service" employees and all other "career service exempt" employees. Municipal Code of Chicago §2-74-030. Only those employees in career service are afforded procedural protections for their employment. Municipal Code of Chicago §2-74-060. Hence, Phelan has no property interest in his position that was created by any state or city law; he was an at will

employee.

Absent an express agreement, an at will employee may still prove a property interest in his or her employment under the second test if there is a "clearly implied promise in their continued employment." *Shlay,* 802 F.2d at 921, *Perry v. Sindermann,* 408 U.S. 593 (1972). In cases regarding at will employees, in order to demonstrate that there is an interest, a plaintiff must show more than a "unilateral expectation" or an "abstract need or desire" for the employment. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). In his amended complaint, Phelan asserts that he was "hardworking, productive, and effective in the position of Ward Superintendent" and that he "received favorable performance evaluations and merit salary raises." Amended Complaint at par. 7. This court has made it clear that these contentions are not enough to meet the test for an implied contract. Specifically, in *Shlay,* we stated that because the Chicago's City Code explicitly defines different categories of employees as "career service" or "career service exempt," other City employees cannot make promises, implied or otherwise, of continued employment that are contrary to the Code. *Shlay,* 802 F.2d at 921-22 (discussing why a "career service exempt" employee of the City of Chicago did not have a property interest in his continued employment). Additionally, this court found that other factors such as longevity of service, good performance reviews and periodic salary increases are insufficient to show a property interest in continued employment. Id. at 922.

Phelan argues that under the notice pleading standard of the Federal Rules of Civil Procedure, he need not state facts to show that he has a property interest in his employment. This court has noted that, although pleading standards are relaxed, a plaintiff must still plead "sufficient facts . . . to allow the district court to understand the gravamen of the plaintiff's complaint." *Kyle v. Morton High School,* 144 F.3d 448, 455 (7th Cir. 1998) (quoting *Doherty v. City of*

Chicago, 75 F.3d 318, 326 (7th Cir. 1996). Even under the relaxed standards, Phelan has not met these minimum requirements in light of our earlier holding in *Shlay.* Based on the pleadings, it is clear that he cannot show any facts to prove that his Due Process rights were violated.

IV. FMLA Claim

Phelan's second claim is that his dismissal violates the FMLA. The district court granted the City's motion to dismiss this claim. We affirm the district court's ruling.

Enacted in 1993, the FMLA was designed to allow employees to take periods of leave from their jobs for various health and family related reasons. In furtherance of this goal, the Act allows both for the employee to take leave and to be reinstated when his or her leave is finished. Specifically, the Act allows a worker to take unpaid leave for a period of up to twelve weeks for reasons that include the birth of a child, the illness of an immediate family member, or the serious health condition of the employee himself. 29 U.S.C. §2612(1). Upon return the employee is guaranteed reinstatement to the employee's original position or an "equivalent position." 29 U.S.C. §2614(1). The FMLA, however, does not entitle any employee to "any right, benefit, or position of employment other than . . . [that] which the employee would have been entitled had the employee not taken leave." 29 U.S.C. §1614(3).

In the case at hand, Phelan elected to take leave under the FMLA for a period of time from September 12, 1997 to October 16, 1997. When he returned to work in October, he was terminated. The City states that prior to Phelan's absence, the quality of his work had been poor, and during his absence the employee hired to fill in for Phelan was more satisfactory. For these reasons, the City chose to terminate Phelan.

In cases such as this where an employee is terminated while taking FMLA leave, the trial court must determine

whether the termination was illegally motivated by the employee's choice to take leave, or whether the termination was motivated by other, valid reasons. *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 804 (7th Cir. 2001). Specifically, we have stated that:

> With no absolute right to reinstatement, whether an employer violates the FMLA turns on why the employee was not reinstated. Clearly, an employee may not be fired because she took leave—that would be in direct violation of the statute. However, an employee may be fired for poor performance when she would have been fired for such performance even absent her leave.
>
> Id. at 805.

In this case, the distinction is an easy one. Plaintiff concedes that he was terminated because of the poor quality of his work. Appellant's Brief at 14-15. The City noted reports made by superiors that Phelan was not managing his assigned ward correctly, that he was unable to work effectively with others, and that he "simply wasn't getting the job done." Appellant's Brief, Short Appendix, at 37. More specifically, the City noted complaints against Phelan stating that he relied too heavily on employees working under him, he was difficult to get a hold of via radio or pager (the normal means to contact ward superintendents), and he refused to drive the city van during working hours; Phelan was ultimately suspended for three days due to similar problems prior to taking his medical leave. Id. at 33-35. Phelan argues that his termination violates the FMLA because it was made while he was on FMLA leave. More specifically, Phelan asserts that the City decided to terminate him for poor performance only after seeing how much better his temporary replacement could perform his job. This, Phelan asserts, is an improper motivation for his termination.

This court directly addressed a similar situation in *Kohls.* In that case, an employee at a nursing home took approximately two months of leave under the FMLA. Id. at 802. While the employee was on leave, the nursing home hired a replacement who performed the job better than the employee. Id. When the employee returned to work, she was terminated. Id. This court held that the termination did not violate the FMLA, specifically noting that:

> does not itself demonstrate that [the employee] would not have been terminated if she had not taken leave. [The employer] would have been entitled to fire [the employee] for mismanagement and mishandling of funds regardless of whether she had taken leave or not.

Id. at 806. Put simply, an employee is not afforded greater rights than he would otherwise have merely because he takes FMLA leave. Hence, it is not in violation of the FMLA for the City to dismiss Phelan for poor performance, regardless of when the City came to that decision. For this reason, the district court's granting of the motion to dismiss was proper. Phelan failed to allege any facts that, if taken as true, would constitute a violation of the FMLA.

V. Equal Protection Claim

Finally, Phelan, a Caucasian man, argues that his dismissal violated Equal Protection provided by the Fourteenth Amendment and §1983 because the City of Chicago treated him unfairly due to his race. The district court granted the City's motion for summary judgment regarding this claim.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual . . . because of such individual's race . . . ." 42 U.S.C. §2000e-2(a)(1). An employee may show such incidents of illegal discrimination through direct proof, or in the absence of such proof, an employee may make a case with sufficient indirect proof, and upon doing so, switch the burden of proof to the employer. In this case, Phelan

proceeds with indirect proof.

The first test developed by the Supreme Court for showing employment discrimination through indirect proof was established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Under that decision, the plaintiff must first demonstrate facts that build a prima facie case of discrimination. The prima facie case consists of a showing by the plaintiff

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp., 411 U.S. at 802. Over time, courts have modified the test to fit a variety of situations. Recently, the Seventh Circuit modified the test to apply to situations where members of majority groups believe they were subject to employment discrimination. *Mills v. Health Care Service Corp.,* 171 F.3d 450, 457 (1999). This court noted that in such cases of "reverse discrimination," the first prong of the *McDonnell* test cannot be used. Id. In its stead, a plaintiff must show "background circumstances" that demonstrate that a particular employer has "reason or inclination to discriminate invidiously against whites" or evidence that "there is something 'fishy' about the facts at hand." Id. at 455 (quoting *Harding v. Gray,* 9 F.3d 150, 153 (D.C. Cir. 1993)).

Phelan argues that this new and different prong imposes an unfair burden to non-minority plaintiffs since a non-minority plaintiff must establish more facts to create the prima facie case. Indeed, this circuit considered that issue in determining how to modify the McDonnell Douglas test to fit incidents concerning reverse discrimination. *Mills v. Health*

Care Service Corp., 171 F.3d 450, 456-57 (7th Cir. 1999). However, this court has recognized that discrimination by employers against white men is a less common phenomenon than discrimination against minorities. Id. For that reason, in order to gain the substantial benefits conferred by the use of the McDonnell Douglas test,[1] the non-minority plaintiff must be able to plead facts to show why it is likely in this case, that an employer had engaged in such unusual behavior. This court stated explicitly that "this modified test is not to be interpreted in a constricting fashion . . . [i]t in no way precludes any plaintiff with direct evidence of discrimination from bringing his claim." Id. at 457. Hence, Phelan must be able to show direct evidence of the racial discrimination waged against him, or meet all the elements of the prima facie case as outlined in *Mills*.

Applying this modified prima facie test to the case at hand, Phelan is unable to demonstrate the necessary "background circumstances"; that is to say, he does not state that there is reason to believe his superiors within the City of Chicago would be inclined to discriminate against white men. Phelan is a white man; his superiors were white men; the worker selected by these superiors to replace Phelan was a white man. Additionally, Phelan cannot show that there was anything "fishy" about his termination that would suggest reverse discrimination. The City stated that an abundance of poor work habits led to his dismissal. Phelan argues that the

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1. The McDonnell Douglas test was created to remedy discrimination against groups that have historically suffered; the test is a powerful tool to do so because it creates an inference of discrimination on the part of employers in the absence of direct evidence of discrimination. Id.

City's proffered reason was false, and alternatively that he was dismissed because his replacement was better than him, or that he was dismissed because of the criminal indictment levied against him. Even if Phelan is correct in asserting that the City misrepresented its "real" reason for terminating Phelan in this way, neither of these alternate theories provide "fishy" circumstances that raise an inference of racial discrimination--or any illegal or improper behavior for that matter.

Phelan also argues that according to a recent case, *Hunt v. City of Markham, Ill.*, 219 F.3d 649 (7th Cir. 2000), this Circuit did not require a showing of unusual background circumstances. Phelan misunderstands this case. In *Hunt,* this court did not apply the McDonnell Douglas test because the plaintiffs had direct evidence of discrimination,[2] and

For these reasons, we AFFIRM.

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2. In their complaint, the plaintiffs stated that the city officials openly discriminated against them and made such statements as "it is the blacks' turn to self-govern in Markham, and if you are white, get out" and "it is our turn; you are the minority now; you hence did not need the aid of *McDonnell Douglas.* Id. at 652. Unlike *Hunt,* Phelan does not offer any such direct proof. Had he done so, he would be correct in arguing that he need not meet the modified *Mills* test. In the absence of such an offer, *Hunt* is of no help to Phelan.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3862

JAMES PHELAN

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 40 —**Ian H. Levin** *Magistrate-Judge.*

[October 21, 2003]

JUDGMENT — ORAL ARGUMENT

Honorable William J. Bauer, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3862

JAMES PHELAN

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 40 —**Ian H. Levin** *Magistrate-Judge.*

[November 21, 2003]

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehaering *en banc* filed in the above-captioned case by plaintiff-appellant, all of the judges on the original panel have voted to DENY the petition for rehearing and no judge in active service has requested a vote ont he petition for rehearing *en banc.*[1] Accordingly, the petition for rehearing and suggestion for rehearing *en banc* is DENIED.

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1. Chief Judge Joel M. Flaum took no part in the consideration of this case.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 CV 40

JAMES PHELAN

Plaintiff,

CITY OF CHICAGO,

Defendants.

MEMORANDUM OPINION AND ORDER

LEVIN, United States Magistrate Judge.

Plaintiff James Phelan ("Plaintiff") has brought a four-count Amended Complaint alleging that his employment with the City of Chicago ("City") was unlawfully terminated in October of 1997. The City moves the court to dismiss Counts I, II, and III of Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth below, the court grants the City's motion to dismiss.

BACKGROUND FACTS

In 1992, Plaintiff was hired by the City as a police officer. (Am.Compl. par. 5.) After Plaintiff took a leave of absence from the City to serve as an Illinois State Representative, he graduated from the Chicago Police Academy in September of 1993. (Id.) In October of 1993, the Chicago Police Department granted Plaintiff a leave of absence which was extended through 1996. (Id.)

In November of 1995, while Plaintiff was on leave from the Chicago Police Department, he was hired by the City's Department of Streets and Sanitation to work as Ward Superintendent for the 23rd Ward. (Am.Compl. par. 6.) Plaintiff worked full-time as Ward Superintendent until July of 1997

at which time he took leave because of personal health problems. (Id. par. 9.) Plaintiff exhausted all of his sick days and was still unable to return to work. (Id.) In September of 1997, he applied for and was granted leave under the Family and Medical Leave Act ("FMLA"). (Id. pars. 9-10.)

In September of 1997, Plaintiff was indicted for mail fraud. (Am.Compl. par. 11.) The indictment did not involve any allegations of misconduct related to Plaintiff's employment with the City. (Id.) Shortly after Plaintiff's indictment was publicly announced, City personnel requested that Plaintiff resign from his position as Ward Superintendent. (Id. par. 12.) When Plaintiff refused to resign, the City informed him that he was being terminated from his position effective October 23, 1997. (Id. par. 13.) On the same day, Plaintiff was reinstated to his Ward Superintendent position from FMLA leave and his discharge from the Department of Streets and Sanitation was processed. (Id. par. 14.)

On October 27, 1997, Plaintiff requested that the City reinstate him to his position as probationary police officer. (Id. par. 15.) The next day, the City delivered a letter to Plaintiff stating that as of October 24, 1997 his "resignation has been processed." (Id.) Plaintiff had at no time resigned from the Chicago Police Department. (Id.) Plaintiff, subsequently, filed the subject Amended Complaint. As is pertinent here, in Count I, Plaintiff alleges Fourteenth Amendment Due Process and §1983 claims stating that he was terminated from his position as Ward Superintendent, as to which he alleges a protected property interest, because he was not afforded notice of the termination and he was not given a hearing prior to his discharge. (Am.Compl. par. 18.) In Count II, Plaintiff alleges that he was terminated while on a FMLA leave, in violation of the FMLA. (Id. par. 19.) In Count III, Plaintiff alleges an equal protection and §1983 claim asserting that after his termination as Ward Superintendent, he was not permitted to seek reinstatement as a police officer due to intentional and arbitrary discrimination. (Id. p

20.)

I.A MOTION TO DISMISS STANDARD

The purpose of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is to test the sufficiency of the complaint, and not to decide its merits. *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir. 1990). Courts read complaints liberally and a motion to dismiss will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In reviewing a motion to dismiss, the district court must treat all well-pleaded allegations as being true and draw all reasonable inferences in the light most favorable to the plaintiff. *Henderson v. Sheahan,* 196 F.3d 839, 845 (7th Cir. 1999), *cert. denied,* 530 U.S. 1244 (2000). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

At the same time, a plaintiff must include in the complaint allegations concerning all material elements necessary for recovery under the relevant legal theory. *Chawla v. Klapper,* 743 F.Supp. 1284, 1285 (N.D.Ill. 1990). This requirement, however, must be considered in light of the federal system of notice pleading, which merely requires that a plaintiff set out in the complaint a short and plain statement of the claim that provides the defendant with fair notice of what the claim is and the grounds upon which it rests. *McCormick v. City of Chicago,* 230 F.3d 319, 323-26 (7th Cir. 2000); *Scott v. City of Chicago,* 195 F.3d 950, 951 (7th Cir. 1999). For fair notice to be given, "[a] complaint must at least 'include the operative facts upon which a plaintiff bases his claims.'" *Lucien v. Preiner,* 967 F.2d 1166, 1168 (7th Cir. 1992) (quoting *Rodgers v. Lincoln Towing Service, Inc.,* 771 F.2d 194, 198 (7th Cir. 1985)). The issue the court reviews is whether "sufficient facts [have been] pleaded to allow the court and the defendants to understand the gravamen of the plaintiff's complaint." *Doherty v. City of Chicago,*

75 F.3d 318, 326 (7th Cir. 1996); *Kyle v. Morton High Sch.*, 144 F.3d 448, 455 (7th Cir. 1998).

ANALYSIS

III. DUE PROCESS CLAIM (COUNT I).

III.A PLAINTIFF FAILS TO STATE A DUE PROCESS CLAIM IN VIOLATION OF THE FOURTEENTH AMENDMENT BECAUSE HE DOES NOT ALLEGE A PROTECTED PROPERTY RIGHT.

For a plaintiff to assert a violation of the Due Process Clause of the Fourteenth Amendment, he must demonstrate that he has a protected property interest in his employment. *Bishop v. Wood,* 426 U.S. 341 (1976); *Board of Regents v. Roth,* 408 U.S. 564 (1972). A property interest requires more than a "unilateral expectation" or "abstract need" for the benefit sought. *Roth,* 408 U.S. at 577. To allege a property interest, a plaintiff must "have a legitimate claim of entitlement to it." Id. Such claims of entitlement are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id.

Therefore, in order for a plaintiff to survive a motion to dismiss a due process claim he "must be able to allege that he has a constitutionally protected property interest in the expectation of continued public employment; and the existence of such an interest is determined by reference to state law." *McElearney v. Univ. of Illinois,* 612 F.2d 285, 289-90 (7th Cir. 1979) (on defendant's motion to dismiss, "examination of relevant state law, consisting of state statutes, case law, and university statutes, establishes that there is no protected property interest").

Plaintiff rests his claim of entitlement to the Ward Superintendent position on Sections 2-100-110 and 2-74-060 of the Municipal Code of Chicago ("Municipal Code"). (Am.Compl. par.7.) However, neither provision supports Plaintiff's claim.

Section 2-100-110 of the Municipal Code does no more than refer to Ward Superintendents as employees of the Department of Streets and Sanitation. Section 2-74-060 provides for hearings for City employees, but by its express terms, it applies only to "career service" employees. It states in pertinent part:

> The personnel board, a member thereof, or a hearing officer appointed by the board shall conduct a hearing of all appeals by any career service employee of discharge, demotion, or suspension for a period of more than ten days upon request of the employee, and may provide by rule for review of suspensions of ten days or less. (emphasis added.)

Section 2-74-060 is consistent with Section 2-74-050(12) of the Municipal Code which gives the City's Commissioner of Personnel the power to issue personnel rules that provide, inter alia,

> (12) For the establishment of disciplinary measures such as suspension, demotion in rank or grade, or discharge. For all permanent employees in the career service, such measures shall provide a statement of the charges on which discipline is based, together with an explanation of the evidence supporting the charges and an opportunity for the employee to respond to the charges in writing before action is taken, appeals after such disciplinary action, and a hearing on the charges upon request of the employee in case of discharge, demotion, or suspension exceeding 30 days, consistent with the requirements of due process of law. (emphasis added.)

The Municipal Code sections relied on by Plaintiff thus clearly create property rights only with respect to "career service" City employees.[1] The Code does not provide

procedures for non-career service employees to challenge their termination, nor does it provide that non-career service employees may be discharged only "for cause." *See also Misek v. City of Chicago,* 783 F.2d 98, 99-100 (7th Cir. 1986) (plaintiffs were found to have property interests in their jobs, because they were career service employees.) Because Plaintiff has not alleged that he was a career service employee and has pleaded no other alleged basis for a protected property right in his job[2] he has not established a basis of entitlement to his position as Ward Superintendent within the meaning of the Due Process Clause of the Fourteenth Amendment.[3]

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1. See Section 2-74-030 of the Municipal Code establishing classifications of City employees, including career service employees (Section 2-74-030(13)) and career service exempt employees (Section 2-74- 303(12)).
2. *See, e.g., Shlay v. Montgomery,* 802 F.2d 918, 921 (7th Cir. 1986).
3. The Amended Complaint refers once to unspecified "City of Chicago Personnel Rules." (Am. Compl. par. 18; see also Pl.'s Resp. Mem. at 3.) This appears to be referring to the subject Municipal Code. In any event, besides this "Rule" reference being inappropriately conclusory, it suffices to say that these Personnel rules are issued pursuant to the same Municipal Code discussed herein (Section 2-74-050) and thus doesn't create greater rights than already discussed herein regarding that Municipal Code.

III.B ALTERNATIVELY: PLAINTIFF FAILS TO PLEAD AN UNLAWFUL MUNICIPAL POLICY UNDER §1983 AS TO HIS DUE PROCESS CLAIM.

In order for a plaintiff to state a §1983 claim against a municipality, he must allege the existence of a municipal policy or custom which caused the alleged violation. *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658, 690-91 (1978). A municipality can be liable under §1983 only where its policy(s) is the "moving force" behind the constitutional violation; i.e., the city's policy must be the source of the discrimination. *Samuel v. City of Chicago,* 41 F.Supp.2d 808, 810 (N.D.Ill. 1999) and cases there cited. To allege that a municipal policy has violated an individual's civil rights under §1983, a plaintiff needs to set forth (1) an express policy that, when enforced, causes a constitutional deprivation; or (2) a widespread practice that, although not authorized by express municipal policy, is so permanent and well-settled that it amounts to a custom with the force of law; or (3) a constitutional injury caused by a person with final policymaking authority. *Baxter by Baxter v. Vigo County Sch. Corp.,* 26 F.3d 728, 734-35 (7th Cir. 1994).

Plaintiffs in a §1983 case against a municipality, though, are required to comply only with the conventional standards of notice pleading; they are not required to meet any heightened pleading standard. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 165 (1993). Plaintiffs need not "allege all, or any of the facts logically entailed by the claim ... A plaintiff does not have to plead evidence ... [A] complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing." *American Nurses' Assoc. v. Illinois,* 783 F.2d 716, 727 (7th Cir. 1986). A plaintiff, nevertheless, must do more than plead an empty allegation of municipal policy to state a §1983 claim. *Taylor v. City of Chicago,* 1997 WL 51445, at *2 (N.D.Ill. Feb. 3, 1997); (citing *Doherty,* 75 F.3d at 326; *McTigue v. City of Chicago,* 60 F.3d 381, 382 (7th Cir. 1995)). "Boilerplate

allegations of a municipal policy, entirely lacking in any factual support that a city policy does exist, are insufficient." *Sivard v. Pulaski County,* 17 F.3d 185, 188 (7th Cir. 1994). A plaintiff must plead operative facts which form the basis of the claim. *McCormick,* 230 F.3d at 325.

In the Amended Complaint here, however, there is no mention at all of a municipal "policy." Thus, there simply is no allegation, conclusory or factual, to support a §1983 due process policy claim against the City here.[4] Moreover, Plaintiff's citation of *Sledd v. Lindsay,* 102 F.3d 282 (7th Cir. 1996) and *Lanigan v. Village of East Hazel Crest,* 110 F.3d 467 (7th Cir. 1997), respectfully, is misplaced. In both of these cases, unlike here, the plaintiffs expressly alleged that the municipalities had maintained certain official policies that violated the plaintiff's civil rights.

IV. PLAINTIFF FAILS TO ALLEGE A VIABLE CLAIM UNDER THE FAMILY AND MEDICAL LEAVE ACT (COUNT II)

In Count II, Plaintiff alleges that he was terminated from his position as Ward Superintendent while on a FMLA leave, in violation of the FMLA. 29 U.S.C. s 2601 et seq. (Am.Compl.p 19.) The City argues that this allegation is insufficient, even under federal notice pleading standards, to state a claim under the FMLA. (Def.'s Mem. at 8.) The court agrees.

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4. In fact, the Amended Complaint, in essence, alleges not that City policy caused a deprivation (as is required), but that the City's act of discharging Plaintiff without notice or a hearing actually runs counter to City policy. (Am.Compl. pars. 14, 18.)

Plaintiff does not allege he was discharged because he sought or took an FMLA leave; rather, Plaintiff alleges only that he was discharged "while on a FMLA leave." (Am.Compl.p 19.) The FMLA, however, prevents employers only from discriminating against employees for requesting leave authorized by the Act. 29 U.S.C. s 2617; *Hypes v. First Commerce Corp.,* 134 F.3d 721, 725-26 (5th Cir. 1998). Therefore, if, as here, Plaintiff fails to allege that his discharge was motivated by his request for leave there is no liability under the FMLA. Id. *See also Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir. 1998). Under the FMLA, there is no absolute right not to be discharged while on such a leave. *Kariotis v. Navistar Int'l Transp. Corp.,* 131 F.3d 672, 681 (7th Cir. 1997) (employee has "no greater right to reinstatement or to other benefits and conditions of employment than if employee had been continuously employed during the FMLA leave period," citing 29 C.F.R. s 825.216(a)). *See also Clay v. City of Chicago,* 143 F.3d 1092, 1094 (7th Cir. 1998) (plaintiff, who was not reinstated to her job on returning from FMLA, but instead was advised she would be discharged, could not show her discharge was for taking FMLA leave and therefore could not prove a violation of the statute).

In short, Plaintiff has not alleged any legal wrong under the FMLA.

V. EQUAL PROTECTION CLAIM (COUNT III)

V.A PLAINTIFF HAS FAILED TO ALLEGE AN EQUAL PROTECTION CLAIM.

Plaintiff alleges that his Fourteenth Amendment equal protection rights were violated when he was discharged and not reinstated to his former position as police officer. (Def.'s Mem. at 4.) Initially, Plaintiff is not alleging an equal protection claim based on his membership in a particular class or vulnerable group. *See, e.g., New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474, 1481-82 (7th Cir. 1990); *Smith v. Town of Eaton,* 910 F.2d 1469, 1472 (7th

Cir. 1990), *cert. denied,* 499 U.S. 962 (1991). Also, the City notes, inter alia, that Plaintiff has not alleged any fundamental right that he is seeking to protect. Accordingly, where, as here, there is no suspect classification or fundamental right asserted, the government action that has been challenged is not subject to strict scrutiny. Instead, that action need only bear a rational relationship to a legitimate governmental purpose. *Turner v. Glickman,* 207 F.3d 419, 424 (7th Cir. 2000); *Wroblewski v. City of Washburn,* 965 F.2d 452, 458 (7th Cir. 1992).

When applying the described rational basis standard, courts presume that the challenged governmental action is constitutional. *Wroblewski,* 965 F.2d at 459 (citing *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976)). Review under the rational basis test "is not a license for courts to judge the wisdom, fairness or logic" of the government action. *FCC v. Beach Comm., Inc.,* 508 U.S. 307, 313 (1993). For a plaintiff to overcome the presumption of rationality, he must meet a heavy burden of showing that the challenged governmental action was "completely ludicrously arbitrary." *Pontarelli Limousine, Inc. v. City of Chicago,* 929 F.2d 339, 342 (7th Cir. 1991).

Plaintiff expressly recognizes that as an essential element of his equal protection claim he must allege that there is "no rational basis" for the City's acts. (Pl.'s Resp. Mem. at 5, quoting *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000).) Plaintiff, however, has not alleged an absence of rational basis for the City's acts.[5] In fact, to the contrary,

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5. To make out a prima facie case of "no rational basis" in a class of one "equal protection" case, the plaintiff, very strictly, must present that the defendant deliberately sought to deprive the plaintiff of equal protection for reasons "of a personal nature" unrelated to the duties of the defendant's position. *Hilton v. City of Wheeling,* 209

Plaintiff does not dispute the City's point that a rational basis existed for the discharge; that is, Plaintiff was indicted on federal mail fraud charges. Accordingly, Plaintiff has failed to state an equal protection claim regarding his subject termination.

V.B PLAINTIFF'S EQUAL PROTECTION CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

As seen, Plaintiff alleges the City failed to reinstate him to a position as a police officer, in violation of the equal protection clause. (Am.Compl. par. 20.) Even, arguendo, if Plaintiff's equal protection claim were otherwise viable, however, this claim is untimely.

The statute of limitations for §1983 claims in Illinois is two years. *Northen v. City of Chicago,* 126 F.3d 1024, 1026 (7th Cir. 1997). Plaintiff did not allege in his original complaints in this cause that he unlawfully was denied reinstatement to a position as police officer. That adverse employment action was raised for the first time in his Amended Complaint filed on or about August 4, 2000. Plaintiff alleges he was denied reinstatement on October 28, 1997 (Am.Compl. par. 15), more than two years before the Amended Complaint was filed. That claim, therefore, is time barred and subject to dismissal. *See e.g., Kauthar SDN BHD v. Sternberg,* 149 F.3d 659, 670 (7th Cir. 1998); *Tregenza v. Great Amer. Communications Co.,* 12 F.3d 717, 718 (7th Cir. 1993).

F.3d 1005, 1008 (7th Cir. 2000). This must entail "vindictive action" which requires proof of a "totally illegitimate animus" toward the plaintiff by the defendant. Id.

Citing Rule 15(c)(2)[6] Plaintiff contends that his discharge as a probationary police officer is not limitations barred as it arose out of the "same conduct, transaction or occurrence" as his discharge as Ward Superintendent set forth in the original pleading(s) herein. The court finds, however, that Plaintiff's claim that the Chicago Police Department failed to rehire him as a police officer does not relate back to the claim that the Department of Streets and Sanitation discharged him from his employment as Ward Superintendent. These separate employment actions at different times by different City departments involving different jobs do not constitute the "same conduct, transaction or occurrence" under Rule 15(c)(2).

V.C ALTERNATIVELY: PLAINTIFF FAILS TO PLEAD AN UNLAWFUL POLICY UNDER §1983 AS TO HIS EQUAL PROTECTION CLAIM.

This §1983 equal protection policy claim of Plaintiff's falls for the same reason(s) set forth in Plaintiff's §1983 due process claim, (Section I.B, supra.) Accordingly, Section I.B of this opinion, supra, is incorporated herein by reference (except for Footnote 4 thereunder).

CONCLUSION

In view of the foregoing, the City's motion to dismiss Counts I, II, and III of Plaintiff's Amended Complaint is granted.

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6. 15(c)(2) Fed.R.Civ.P.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 CV 40

JAMES PHELAN

Plaintiff,

CITY OF CHICAGO,

Defendants.

MEMORANDUM OPINION AND ORDER

LEVIN, United States Magistrate Judge.

Plaintiff James Phelan ("Plaintiff") seeks recovery against Defendant City of Chicago (the "City") for reverse race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e et seq. Pending before the Court is the City's Motion for Summary Judgement. For the reasons set forth below, the Court grants the City's Motion for Summary Judgment.

BACKGROUND FACTS

Plaintiff was first hired by the City as a police officer in 1992. (2nd. Am.Compl.par. 4.) After Plaintiff took a leave of absence from the City to serve as an Illinois State Representative, he graduated from the Chicago Police Academy in September of 1993. (Id.) In October of 1993, the Chicago Police Department granted Plaintiff a leave of absence, which was subsequently extended for twelve month periods in 1994, 1995, and 1996. (Id. par. 6.)

On November 1, 1995, while Plaintiff was on leave from the Chicago Police Department, he was hired by the City's Department of Streets and Sanitation to fill the Ward Superintendent position for the 23rd Ward. (2nd. Am.Compl.par. 7.) Eileen J. Carey (Caucasian), the Commissioner of the

Department of Streets and Sanitation, interviewed Plaintiff and made the decision to hire him for the Ward Superintendent position.[1] (Def.'s LR56. 1(a)(3) St. par. 15, 18.) In his position as Ward Superintendent, Plaintiff typically supervised two Refuse Collection Coordinators and twenty-two laborers who operated ten garbage trucks and one street sweeper. (Def.'s LR56. 1(a)(3) St. par. 22.) Plaintiff's immediate supervisor was Thomas Ryan (Caucasian), the Superintendent for Division IV of the Bureau of Sanitation, Department of Streets and Sanitation. (Id. par. 19.) Ryan reported to Michael Picardi (Caucasian), the General Superintendent for the Department of Streets and Sanitation, Bureau of Sanitation. (Id. par. 20.) Picardi reported to Sanchez who in turn reported to Carey.[2] (Id.)

Plaintiff worked full-time as Ward Superintendent until June of 1997, when he took a leave of absence because of personal health problems. (Def.'s LR56. 1(a)(3) St. par. 50; Catharine Mullen Hennessy Aff. par. 3.) Subsequently, in September of 1997, while Plaintiff was still on leave, he applied for and was granted leave under the Family and Medical Leave Act ("FMLA"). (Id.) In September of 1997, Plaintiff was indicted for mail fraud. (2nd. Am.Compl.par. 15.) The indictment did not involve any allegations of

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1. Alfred Sanchez (Hispanic), Deputy Commissioner of the Department of Streets and Sanitation also interviewed Plaintiff for the Ward Superintendent position and recommended to Carey that she hire Plaintiff. (Def.'s LR56. 1(a)(3) St. par. 16, 17.)
2. William Bresnahan (Caucasian) was the Assistant Commissioner of the Department of Streets and Sanitation during the relevant period. (Def.'s LR56. 1(a)(3) St. par. 31.)

misconduct related to Plaintiff's employment with the City. (Id.) Plaintiff was subsequently acquitted of the mail fraud charges. (Id.)

In October of 1997, when Plaintiff returned from his leave of absence, Carey terminated him because of his poor performance.[3] (Def.'s LR56. 1(a)(3) St. par. 59.) Carey informed Bresnahan of her decision to terminate Plaintiff's employment, and explained that a change was being made with the Ward Superintendent in the 23rd Ward. (Id. par. 60.)

On October 16, 1997, Plaintiff and his attorney met with Bresnahan and Sanchez. (Def.'s LR56. 1(a)(3) St. par. 63.) During the meeting, Plaintiff was given a termination letter and told by Sanchez that he was being terminated because he was an ineffective Ward Superintendent. (Id. par. 64.) Upon the advice of his attorney, Plaintiff signed the termination letter and Bresnahan provided Plaintiff with a copy of the letter. (Id. par. 65.) Plaintiff's reinstatement from his leave of absence and termination were processed with an effective date of October 23, 1997. (Id. par. 66.)

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3. The issues involving Plaintiff's poor performance included the fact that he could not get his ward cleaned in a timely manner; his superiors' were unable to locate him when he was suppose to be accessible; he was not able to answer basic questions regarding the status of his ward's clean-up efforts; his reliance on two coordinators working under him; and his refusal to use the assigned City van during working hours. (See Def.'s LR56. 1(a)(3) St. paras. 25, 27, 29, 30, 32, 34, 35, 37.)

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *Sec also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Once the moving party has produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC v.Fin. Corp. v. Onwuteaka,* 129 F.3d 917, 920 (7th Cir. 1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and to draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis Univ.,* 137 F.3d 962, 964 (7th Cir. 1998). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also LINC,* 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson,* 477 U.S. at 247, 106 S.Ct. 2505, 91 L.Ed. 2d 202 or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505, 91 L.Ed. 2d 202.

"[S]ummary judgment is improper in a discrimination case where a material issue involves any weighing of conflicting indications of motive and intent." *Stumph v.*

Thomas & Skinner, Inc., 770 F. 2d 93, 97 (7th Cir. 1985), citing, *Kephart v. Inst. of Gas Tech.*, 630 F. 2d 1217, 1218 (7th Cir. 1980). On the other hand, the Seventh Circuit in *Palucki v. Sears, Roebuck & Co.*, 879 F. 2d 1568, 1573 (7th Cir. 1989) explained that summary judgment can be appropriate in employment discrimination cases when:

> . . . realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, [has] led the courts to take a critical look at efforts to withstand ... summary judgment. A district judge faced with such a motion must decide ... whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict. If not, the motion should be granted and the case dismissed.

ANALYSIS

I. MOTION TO STRIKE

Plaintiff first moves to strike over forty paragraphs of the City's Statement of Undisputed Material Facts submitted in support of its Motion for Summary Judgment. For the following reasons, the Court denies, in part, and grants, in part, Plaintiff's Motion to Strike.

Plaintiff first contends that the facts delineated in paragraphs 10-14, 16, 17, 19-21, 23-43, 49, 53-62 and 80 should be stricken because they are not "of consequence" pursuant to Rule 401 of the Federal Rules of Evidence to a determination of whether the City is entitled to summary judgment because they primarily relate to performance problems which Plaintiff claims are irrelevant or unknown by Carey, the decision-maker in this case. (Fed.R.Evid.401.) Plaintiff asserts that the cited factual contentions identifying those individuals who interviewed or supervised him as well as those contentions delineating the races of the previous Ward Superintendents (including the subject 23rd Ward) have no bearing on

any issue in this case. (Pl.'s Mot. to Strike at 1-2.)

The Court disagrees with Plaintiff and finds that because one of the prima facie issues in this case is whether Plaintiff was performing his job according to the City's legitimate expectations, evidence concerning Plaintiff's performance is clearly relevant, material and "of consequence" to the Court's determination of the subject summary judgment motion.[4] The Court also notes that even though Carey may not have been aware of every incident involving Plaintiff's performance, information concerning Plaintiff's poor performance was communicated to her through Plaintiff's superiors and is clearly "of consequence" the determination of whether he was performing his job satisfactorily. Furthermore, the identity of those individuals who interviewed or supervised Plaintiff as well as a delineation of the races of the previous Ward Superintendents is clearly relevant in a reverse race discrimination action.

Plaintiff contends that paragraphs 10-12 should be stricken because they constitute expert opinion regarding the job responsibilities of a Ward Superintendent and the City has not complied with the expert disclosure requirements of Rule 26(a)(2) of the Federal Rules of Civil Procedure. (Pl.'s Mot. to Strike at 3; Fed.R.Civ.P. 26(a)(2).) The Court, however, finds that Plaintiff's assertion is without merit, in that, the Affidavit statement (which is the basis for paragraphs 10-12) made by Plaintiff's supervisor (Ryan) would be viewed by the Court as lay testimony that is not subject to the expert disclosure requirements of Rule 26(a)(2).

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4. The Court strikes paragraph 21 of the City's Statement of Undisputed Material Facts because it is irrelevant to the Court's determination of the subject motion.

Plaintiff asserts that paragraphs 37, 40-43, 49, 53, and 56-59 should be stricken because they are based on self-serving and conclusory assertions contained in affidavits. (Pl.'s Motion to Strike at 3-4.) The Court, however, finds that the above-cited paragraphs should not be stricken because the subject affidavits comply with Rule 56(e) of the Federal Rules of Civil Procedure, in that, they are based on the personal knowledge (of a witness competent to testify) and set forth admissible facts. (Fed.R.Civ.P.56(e).) Specifically, the affidavits signed by Eileen Carey, Thomas Ryan, Alfred Sanchez, William Bresnahan, and Catharine Mullen Hennessey, which the subject paragraphs are based on, demonstrate compliance with the federal rule. The Court also notes that some of the above-cited paragraphs referenced by the Plaintiff do not cite to any affidavits (i.e., paragraphs 40-43, 56 and 59); rather, they are based on deposition testimony.

Plaintiff next asserts that paragraphs 10-12, 37, 38, 40-43, 49, 53-60, and 61 should be stricken because they are based on inadmissible evidence. (Pl.'s Mot. to Strike at 4.) As determined by the Court *supra,* paragraphs 37, 40-43, 49, 53, and 56-59 are based on affidavit and/or deposition testimony which complies with Rule 56(e); consequently, the factual contentions constitute admissible evidence. (Fed.R.Civ.P.56(e).) Furthermore, paragraphs 10-12, 38, 60, and 61 contain relevant factual contentions based on admissible affidavit and/or deposition testimony; therefore, the Court will not strike them.

Plaintiff further asserts that paragraphs 38, 54, 55, and 60-62 should be stricken because they contain inadmissible hearsay since they describe conversations between various City employees concerning Plaintiff's performance. (Pl.'s Mot. to Strike at 4.) The Court disagrees. The Court finds that these statements are not being offered for the truth of the matter asserted and are not inadmissible. *See e.g., Brill v. Lante Corp.,* 119 F.3d 1266, 1271 (7th Cir. 1997) (holding

that out-of-court statements concerning an employee's performance problems did not constitute inadmissible hearsay because they went to the issue of the employer's honest belief concerning such problems.)

II. RACE DISCRIMINATION CLAIM

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race ..." 42 U.S.C. s 2000e-2(a)(1). In order to prove a case of race discrimination under Title VII, Plaintiff must offer direct evidence of discrimination or, if he is unable to do so, he may use the indirect, burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Because Plaintiff has not offered any direct evidence of discrimination, his case is governed by the McDonnell Douglas indirect, burden-shifting approach.[5]

Under the *McDonnell Douglas* burden-shifting framework, Plaintiff must first establish a prima facie case of reverse race discrimination. *Ferguson v. Robert R. McCormick Tribune Found.,* 108 F.Supp. 2d 1033, 1038 (N.D.Ill. 2000) ("... plaintiff has the initial burden of establishing a prima facie case of reverse discrimination"); *Paulos-Johnson v. Advocate Trinity Hosp.,* No. 01 C 3639, 2002 WL 230908, at *5 (N.D.Ill. Feb. 15, 2002). In order to establish a prima facie case of reverse race discrimination using the *McDonnell*

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5. Plaintiff concedes that he has no direct evidence of race discrimination and that he must proceed via the indirect *McDonnell Douglas* burden shifting-method.

Douglas framework, Plaintiff must show that: (1) background circumstances exist which support an inference that the City is one of those unusual employers who discriminates against the majority; (2) he was meeting the City's legitimate performance expectations (i.e., he was performing his job satisfactorily); (3) he was subjected to an adverse employment action; and (4) the City treated similarly situated employees outside the protected class more favorably. *Mills v. Health Care Serv. Corp.,* 171 F.3d 450, 455-57 (7th Cir. 1999); *Ferguson,* 108 F.Supp. 2d at 1038; *Paulos-Johnson,* 2002 WL 230908, at *5-6.

If Plaintiff establishes a prima facie case, the burden of production shifts to the City to produce a legitimate, nondiscriminatory reason for its adverse employment action. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981); *Vakharia v. Swedish Covenant Hosp.,* 190 F.3d 799, 806 (7th Cir. 1999). The City must produce "evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993) (emphasis in original). If the City sets forth a legitimate justification for its action, the burden then shifts back to Plaintiff to prove that the City's reason is a pretext for discrimination. *Texas Dep't of Community Affairs,* 450 U.S. at 255-56, 101 S.Ct. 1089, 67 L.Ed. 2d 207; *Vakharia,* 190 F.3d at 806-07. The ultimate burden of persuasion remains at all times with Plaintiff. *St. Mary's Honor Center,* 509 U.S. at 507, 113 S.Ct. 2742, 125 L.Ed. 2d 407. For the reasons stated below, Plaintiff has failed to establish a prima facie case of reverse race discrimination under Title VII because he has not met the first, second and fourth elements recited above. In any event, Plaintiff has also not shown pretext herein. Therefore, Plaintiff's reverse race discrimination claim is unavailing.

A. Background Circumstances

Plaintiff initially argues that he was treated differently because of his race (Caucasian), such that, the City would not have discharged a similarly situated African-American or Hispanic Ward Superintendent. (Pl.'s Mem. at 3.) Moreover, Plaintiff contends that the City has attempted to cover up the real reason for why he was terminated. (Id. at 1.)

In order to establish a prima facie case of reverse discrimination, the Seventh Circuit has ruled that Caucasian plaintiffs must establish background circumstances "support[ing] an inference that the defendant is one of those unusual employers who discriminates against the majority." *Mills,* 171 F.3d at 455 (citation omitted); see also *Ferguson,* 108 F.Supp. 2d at 1038; *Paulos-Johnson,* 2002 WL 230908, at *5-6.[6] Such background circumstances include evidence

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6. Plaintiff contends that the Seventh Circuit in Hunt v. City of Markham, 219 F.3d 649 (7th Cir. 2000) rejected the *Mills* formulation of the prima facie requirements in reverse discrimination cases. (Pl.'s Mem. at 4-5.) The Seventh Circuit, however, did no such thing. Rather, Hunt involved a situation where the plaintiffs presented direct evidence of discrimination in the form of racist comments by City officials. Id. at 652-53. As a result, there was no need for the Seventh Circuit to address the prima facie elements that must be established where the plaintiff has no direct evidence of discrimination. Plaintiff also contends that even though he is Caucasian, the Court should not view this case as a reverse discrimination case because it does not arise out of efforts to redress discrimination through affirmative action. (Pl.'s Mem. at 3-4.) In *Hunt,* however, the Seventh Circuit recognized that race discrimination claims by Caucasian plaintiffs constitute "reverse race discrimination" claims, even if such claims do not "arise out of efforts to redress historic

that the employer has some reason or inclination to discriminate against the majority (i.e., Caucasians), or evidence that there is something "fishy" (or strange) about the facts of the case. *Mills,* 171 F.3d at 455 (citations omitted); *Ferguson,* 108 F.Supp. 2d at 1038. Moreover, in *Mills,* the Seventh Circuit noted that "if a plaintiff cannot show background circumstances, but 'has established a logical reason to believe that the [employer's] decision rests on a legally forbidden ground,' such as his race ... he may shift the burden to the defendant to prove that the challenged employment action was actually based on legitimate, non- discriminatory reasons." Id. at 457 (citation omitted).

Plaintiff has failed to establish the first element (background circumstances) of his prima facie case of reverse discrimination, as there is nothing in the record to indicate that Plaintiff's employer had any reason or inclination to discriminate against Caucasians, the facts of the case are strange, or the City's decision rests on a legally forbidden ground.[7] In fact, the record evidence favors the City on this

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injustices or mitigate racial tensions ..." *Hunt,* 219 F.3d at 651.

7. Herein, Plaintiff contends that the recent "adjudication of discrimination by [the City of Chicago] against white firefighters" (Pl.'s Mem. at 5 n. 3) in Cloud v. City of Chicago, No. 88 CV 3773, 2002 WL 1160930 (N.D.Ill. May 31, 2002) constitutes evidence of background circumstances. The Court, however, notes that Cloud involved an entirely different department of the City of Chicago (the fire department), different decision-makers, a different type of discrimination (failure-to- promote), and a different period of time (including actions dating back to the late 1980's and early 1990's).

first element. For example, the facts in the case show that: (1) the majority of Ward Superintendents employed by the City between January 1, 1995 and December 31, 1997 were Caucasian;[8] (2) the 23rd Ward never employed a non- Caucasian Ward Superintendent; (3) Plaintiff was replaced on both a temporary and permanent basis by Caucasian Ward Superintendents; (4) all but one of the individuals even tangentially involved in Plaintiff's termination are Caucasian; and (5) Plaintiff was hired and fired by the same (Caucasian) decision-maker (Carey). (Def.'s LR56. 1(a)(3) St. paras. 13-15, 18-20, 31, 52, 57, 59.) The Court, therefore, finds that Plaintiff cannot establish the first element of his prima facie case.

B. Performance Expectations

Plaintiff asserts that he was performing his job adequately as Ward Superintendent from November 1, 1995 to October 16, 1997, the time during which he was employed by the City. (Pl.'s Mem. at 5.) During this period, Plaintiff contends he did not receive written criticisms ("write-ups") and was awarded merit raises based on two annual performance appraisals. (Id.) In addition, Michael Zalewski, the alderman for the 23rd Ward, wrote a letter on January 17, 1997 to Carey praising Plaintiff's job performance as Ward Superintendent. (Id. at 5-6.) Based on this letter, Plaintiff asserts that Alderman Zalewski agreed that Plaintiff was working

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8. The Ward Superintendents employed by the City between January 1, 1995 and December 31, 1997 were comprised of the following races: thirty- eight were Caucasian; twenty-three were African-American; fifteen were Hispanic; and one was Asian. (Def.'s LR56. 1(a)(3) St. par. 13.)

hard as a Ward Superintendent and confirmed that he was doing a good job for the Ward. (Id. at 6.) Moreover, Plaintiff believes that Alderman Zalewski's views are entitled to greater weight because he worked for the Department of Streets and Sanitation for eighteen years before he became an alderman. (Id.)

In point of fact, however, Plaintiff has failed to establish the second element (that he was meeting the City's legitimate performance expectations) of his prima facie case because there is no evidence in the record to contradict or refute the City's contentions that he was not performing his job satisfactorily.[9] Plaintiff's contention that he was meeting the

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9. Plaintiff failed to submit the required Northern District of Illinois Local Rule 56. 1(b)(3)(A) response (which should include specific references to affidavits, parts of the record, and other supporting material relied upon) to Defendant's Statement of Undisputed Facts. Moreover, Plaintiff failed to prepare the required Local Rule 56. 1(b)(3)(B) statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. Rather, the statements prepared by Plaintiff, respectfully, consist principally of references to unauthenticated exhibits, non-specific or inappropriate deposition pages, and unsupported conclusions. Furthermore, Plaintiff objects to many of the City's undisputed facts as being "not material to this case" and state that they are "not supported by admissible evidence and are the subject of [P]laintiff's motion to strike."

The Court further notes that the Seventh Circuit has emphasized that, "[D]istrict courts are not obliged in our adversary system to scour the record looking for factual disputes ..." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d

City's legitimate performance expectations because he had not received any written criticisms of his performance is unavailing because there is no record evidence to suggest that the Department of Streets and Sanitation had a "policy" requiring that written criticisms or "write-ups" be placed in an employee's personnel file, or that an employee be informed (in writing or otherwise) that his performance was not satisfactory.[10] Moreover, Plaintiff's claim that he was never told that he was performing below the City's expectations disregards evidence in the record indicating that Plaintiff's superiors discussed his performance deficiencies amongst themselves and Ryan, his immediate supervisor, discussed Plaintiff's performance shortcomings with him. (Def.'s LR56. 1(a)(3) St. pp 23-25, 27-35, 37-42.)

Based on the record evidence, Ryan had a number of problems with Plaintiff's performance while he was a Ward Superintendent which Ryan reported to his superiors; namely, Picardi, Sanchez and Carey. (Def.'s LR56. 1(a)(3) St. paras. 23, 24.) For example, Plaintiff was not able to respond immediately to telephone requests from Ryan regarding the "vitals" of the Ward (Plaintiff would have to call Ryan back

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918, 922 (7th Cir. 1994). Consequently, the appropriate remedy for Plaintiff's failure to comply with the Court's rules is for the City's facts to be deemed admitted. See id.

10. Plaintiff's reliance on seven unauthenticated documents placed in the personnel files of three Ward Superintendents by different decision- makers during the 1990's criticizing various aspects of their performance is insufficient to create such a policy. (See Exhibits attached to Pl.'s Add'l Factual Propositions.)

later with an answer); Plaintiff relied too heavily on the two coordinators working under him; Plaintiff refused to use his assigned City van during working hours; and Plaintiff could not be readily located via a City-issued pager or radio. (Id. paras. 25, 27, 29, 30, 32.) At one time, Ryan wrote Plaintiff up for a three-day suspension for several of these problems; including, his inability to locate Plaintiff and Plaintiff's refusal to drive the City-issued van. (Id. par 34.)

Plaintiff's assertion that he was meeting the City's performance expectations because he received merit increases based on his performance evaluations is unmeritorious. Plaintiff received performance ratings of "Good," which rather than confirming his performance was meeting expectations, merely indicated "acceptable performance, improvement is possible" and is the lowest rating an employee can receive and still receive a merit increase. (Def.'s LR56. 1(a)(3) St. paras 44-48.) Sanchez, the supervisor who was responsible for completing Plaintiff's performance evaluations, indicated that he gave Plaintiff "Good" ratings only because he did not want to penalize Plaintiff monetarily for performing poorly, and he hoped Plaintiff's performance would improve. (Id. par. 49.) Moreover, as the evidence shows, while Plaintiff was on medical leave, when another Ward Superintendent (Caucasian) performed his duties, the 23rd Ward ran more smoothly and there was a noticeable improvement.[11] (Id. par. 52, 57.)

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11. During the summer of 1997, while Plaintiff was on medical leave, his duties were performed by foremen, Horatio D'Oronzo (Caucasian) from June 1, 1997 through June 30, 1997 and James Krystiniak (Caucasian) from July 7, 1997 through October 1997. (Def.'s LR56. 1(a)(3) St. par. 52, 57.) During the time period that Krystiniak filled in for Plaintiff, sanitation services in the 23rd Ward ran smoother. (Id. par. 53.) For example, Krystiniak was more effective and efficient, could be easily located, and displayed good management skills. (Id.) Sanchez and

Plaintiff's next contention that Alderman Zalewski's January 17, 1997 letter to Carey constitutes evidence that he was meeting the City's performance expectations is without merit. As is pertinent here, in his letter, Alderman Zalewski commends Plaintiff's efforts in removing snow on one occasion. Initially, this letter is unauthenticated hearsay, which must be stricken for the reasons set forth in footnote 9, supra. In any event, the Court finds that Alderman Zalewski's subject opinion of Plaintiff's performance is entirely irrelevant because he was not a decision-maker with respect to Plaintiff's employment; he was not involved in evaluating Plaintiff's general and total performance; he was not employed by the Department of Streets and Sanitation at the time he wrote the January 17, 1997 letter; and he was not a party to any discussions involving Plaintiff's performance. (Def.'s Resp. to Pl.'s Add'l Factual Props. par. FII.02-03.)

In view of the foregoing, the Court finds that Plaintiff cannot establish the second element of his prima facie case, because he has failed to present evidence that his job performance met the City's legitimate expectations.[12]

Picardi discussed the fact that Krystiniak was doing a much better job in the 23rd Ward than Plaintiff had been doing, and concluded that they would have fewer problems if Krystiniak took over as Ward Superintendent. (Id. par. 54.) Krystiniak worked as Ward Superintendent after Plaintiff's discharge; however, Plaintiff was permanently replaced by D'Oronzo. (Id. par. 52.)

12. The Court notes that Plaintiff has attempted to create an issue of fact concerning his performance by suggesting that he believed he was satisfactorily performing. However, as the Seventh Circuit has stated, an employee's own assessment of his job performance is not sufficient to overcome the employer's good faith business judgment regarding the employee's performance. *Fortier v.*

C. Similarly Situated Employees

Plaintiff argues that he was terminated from his position as Ward Superintendent by the City because he was indicted for mail fraud. (Pl.'s Mem. at 9.) Moreover, Plaintiff asserts that the City would not have terminated a similarly situated African-American or Hispanic Ward Superintendent who had been charged with a criminal offense. (Id.) Plaintiff specifically points to the treatment of one City employee, John Robertson (African-American),[13] whom he asserts was

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Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1114 (7th Cir. 1998). Moreover, it is not appropriate for the Court to substitute its own judgment of Plaintiff's performance for that of the City's business judgment. *See Mills,* 171 F.3d at 459 ("[This court does] not sit as a 'super-personnel department' with plenary authority to review [an employer's] business decisions").

13. Plaintiff originally argued that three other non-Caucasian City employees; namely, Charles Fisher (African-American, Ward Superintendent, and career-service employee); Lashon Bennett (African-American, motor truck driver in the City's Fleet Management Department, and career-service employee) and Timothy Robinson (African-American, clerk in the City's Revenue Department, and career-service employee) who were involved in similar situations were allowed to remain employed, either on the job or on paid administrative leave during the investigations of their matters. (Def.'s LR56. 1(a)(3) St. par. 71-75.) In Plaintiff's responsive brief, however, he now asserts that only Robertson is similarly situated. (Pl.'s Mem. at 2, 11.)

    In any event, Bennett, Robinson, Fisher and Robertson are not similarly situated to Plaintiff. First, neither Bennett nor Robinson were employed by the City as Ward

charged with a crime, but was placed on administrative leave pending the outcome of his indictment and given career

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Superintendents, and Robinson never worked in the Department of Streets and Sanitation. Rather, both Bennett and Robinson worked in entirely different positions. (Def.'s LR56. 1(a)(3) St. par. 73- 74.) For this reason, Bennett and Robinson cannot be considered similarly situated to Plaintiff. *See Auston v. Schubnell,* 116 F.3d 251, 254 (7th Cir. 1997) (declining to consider individuals proffered by the plaintiff to be "similarly situated" where the plaintiff provided no evidence that the individuals were in the same department as plaintiff, worked the same hours, or reported to the same supervisor); *Mora v. Chicago Tribune,* 57 F.Supp. 2d 626, 635 (N.D.Ill. 1999) (holding that to be similarly situated, a plaintiff must show that employees "(1) held the same or similar employment positions; (2) had similar employment histories; and (3) engaged in similar misconduct giving rise to the employment action"). In addition, unlike Plaintiff, the four individuals identified by Plaintiff as similarly situated were career-service employees and, as a result, they were entitled to certain job protection procedures, whereas Plaintiff had no expectation of job protection and was an employee-at-will. (Id. par. 73-78.) Furthermore, William McTighe, a Caucasian Ward Superintendent, was investigated by the Inspector General's Office but was not terminated. (Id. par. 79.) Thus, Plaintiff's attempt to compare himself to career- service employees fails as does his claim that the City terminates Caucasian employees accused of misconduct while retaining African-American employees accused of misconduct.

service protection (and was not terminated). (Id. at 11.) Plaintiff, thus, claims that the City's treatment of Robertson constitutes evidence of its policy to retain African-American or Hispanic Ward Superintendents who are charged with a crime by placing them on leave pending resolution of the matter and reinstating them if the resolution is favorable to the employee. (Id.)

Plaintiff has failed to establish the fourth element of his prima facie case because he has failed to identify even one similarly situated individual that was treated more favorably by the City. To establish this element, Plaintiff must point to similarly situated non-Caucasian employees who engaged in similar conduct (i.e., employees who demonstrated similar deficiencies in their performance of the Ward Superintendent position), but were neither disciplined nor terminated. *See e.g., Ferguson,* 108 F.Supp. 2d at 1039. "Such a comparison must 'demonstrate more than occasional leniency toward other employees who had engaged in conduct of a similar nature.'" Id. (citation omitted.)

Specifically, Plaintiff cannot compare himself to Robertson. First, Plaintiff has failed to establish any evidence supporting his assertion that he was terminated because he was indicted for mail fraud.[14] In fact, even though Plaintiff was not terminated until he returned to work from a leave of absence in October 1997, the decision to terminate Plaintiff was made by Carey during the summer of 1997, prior to Plaintiff's September 30, 1997 indictment. (Def.'s LR56.

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14. While the City denies that it terminated Plaintiff because of his indictment, it is significant to note that Title VII does not protect individuals from being terminated simply because they have been indicted. See 42 U.S.C. s 2000e et seq.

1(a)(3) St. par. 56-68.) The decision to terminate Plaintiff was based on Sanchez's and Carey's realization that Krystiniak (Plaintiff's replacement) was a more efficient and effective Ward Superintendent than Plaintiff. (Id. par. 52-57.) Since the decision to terminate Plaintiff was made prior to his indictment, Plaintiff cannot be considered to be similarly situated to Robertson who was indicted and subsequently placed on administrative leave pending the outcome of his indictment.

Next, Plaintiff's comparison to Robertson also fails because Robertson, unlike Plaintiff, received career-service status because he was employed by the City in a different position prior to becoming a Ward Superintendent in 1986. (Def.'s Resp. to Pl.'s Add'l Factual Props. pp FII.02-03.) Consequently, Plaintiff who was not a career-service employee was not entitled to the same job protection procedures as Robertson, and therefore is not similarly situated.[15] (Def.'s LR56. 1(a)(3) St. par. 77.)

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15. The position of "Ward Superintendent" has been an "exempt" or non-career service position since 1983 when judgment was entered in *Shakman v. Democratic Org. of Cook County,* 569 F.Supp. 177 (N.D.Ill. 1983). As noted, Plaintiff argues that the City afforded career-service protection to Robertson, an African-American who was hired as Ward Superintendent after the Shakman judgment and was not terminated when he was accused of wrongdoing. (Pl.'s Mem. at 2; Pl.'s LR56. 1(b)(3)(B) St. pFI.01.) Robertson, however, was a career-service employee by virtue of his prior positions with the City. (Def.'s Resp. to Pl.'s Add'l Factual Props. par. FI.01; Hennessy Aff.par. 4; Pl.'s Ex. 34.) As such, unlike Robertson, Plaintiff was hired directly into the non career-service position of Ward Superintendent.

The Court, therefore, finds that Plaintiff cannot establish the fourth element of his prima facie case because he has failed to present evidence identifying any similarly situated individuals (i.e., non-Caucasian Ward Superintendents whose performance was poor) who were treated more favorably than he was by the City.

D. Pretext

Even assuming *arguendo* that Plaintiff has made the requisite *prima facie* showing as to the issues of background circumstances, performance expectations, and similarly situated employees, Plaintiff would still need to demonstrate that the City's proffered reason for its employment decision is a pretext for race discrimination. *See e.g. Vakharia,* 190 F.3d at 806-07. "Pretext ... means a lie, specifically a phony reason for some action." *Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343, 348 (7th Cir. 1997). Plaintiff need only "produce evidence from which a rational factfinder could infer that [the City] lied about its proffered reasons *Weisbrot v. Med. College of Wis.,* 79 F.3d 677, 682 (7th Cir. 1996).[16] "The pretext inquiry focuses on the honesty-not the accuracy-of the employer's stated reason for the [adverse job action]." *Gibson v. AT & T Corp.,* No. 97 C 0501, 1998 WL 774687, at * 8 (N.D.Ill. Oct. 28, 1998) (citation omitted). In addition, "[t]he fact that [an] employer was mistaken or based its decision on bad policy, or even just plain stupidity,

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16. An employee may establish pretext by proving one of the following: "(1) the proffered reasons are factually baseless; (2) the proffered reasons were not the actual motivation for the [adverse action]; or (3) the proffered reasons were insufficient to motivate the [adverse action]." *Wolf v. Buss, Inc.,* 77 F.3d 914, 919 (7th Cir. 1996).

goes nowhere as evidence that the proffered explanation is pretextual." *Essex v. United Parcel Serv., Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997).

Plaintiff argues that the City's purported reason (i.e., poor performance) for terminating him is pretextual and fails for several reasons. (Pl.'s Mem. at 7.) First, Plaintiff contends that the City could not honestly have believed that his performance warranted termination because his personnel file did not contain any written evidence of performance problems; he was never disciplined for failing to clean his ward; he received merit increases; and Alderman Zalewski wrote a letter praising him for his cleanup efforts during a snow storm in the winter of 1997. (Id. at 10-11.) The Court, however, finds that Plaintiff's assertions that his performance was not deficient fails for the reasons discussed supra in this opinion.[17]

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17. For instance: (1) Plaintiff has not offered any admissible evidence to contradict the performance deficiencies described in the record by the City; (2) the City has no policy requiring written or verbal criticism of poor performance; (3) Plaintiff cannot dispute the fact that his superiors discussed his performance problems amongst themselves; (4) Plaintiff's performance ratings of "Good" (which resulted in merit increases) indicated that "improvement is possible" and were given by Sanchez solely in an effort to avoid monetary penalties for Plaintiff's poor performance; (5) the 23rd Ward ran more smoothly when Plaintiff was replaced (by a Caucasian employee--Krystiniak) while he was on leave; (6) Zalewski's opinion of Plaintiff's performance is irrelevant because he was not a decision-maker in this case; and (7) Plaintiff's own view of his performance is insufficient to create a question of fact.

Next, Plaintiff contends that the City could not have honestly believed that his poor performance warranted termination because the testimony of the decision-maker in this case, Carey, could not recall specific dates of conversations and she could not recall her involvement with the processing of certain paperwork involving his leave of absence and termination; consequently, Carey's inability to recall establishes pretext. (Pl.'s Mem. at 7-9.) On this point, however, the City asserts that Plaintiff grossly overstate's Carey's lack of recollection with respect to certain details, but more importantly, Plaintiff's attorney failed to ask the appropriate deposition questions of Carey and failed to adequately follow-up on questions which ultimately led to certain unanswered questions remaining after her deposition. (Def.'s Mem. at 11.) The City, thus, contends that Carey's affidavit is not an effort to "patch up her poor deposition performance" as Plaintiff contends (Pl.'s Mem. at 3); rather, it was necessitated by Plaintiff's attorney's decision not to pursue various lines of inquiry. (Id.)

Respectfully, the Court finds the City is correct. For example, although Plaintiff asserts that "Carey was ... unable to explain at her deposition why Plaintiff had been fired effective October 23, 1997" (Pl.'s Mem. at 7), she testified as follows:

> Q. [By Plaintiff's attorney] Do you know why the date of October 23, 1997 was chosen?
> A. [By Carey] I think--I think there were always seven days given in a termination. (Carey Dep. at 36; See Def.'s Resp. to Pl.'s Add'l Factual Props. par. FIV.02.)

Moreover, even though Carey could not recall the specific reasons for Plaintiff's termination, she testified that she made the decision "because the people supervising him, [said] he was not performing, ..., what we considered, ... the duties of the Ward Superintendent." (Carey Dep. at 10.) Carey further testified:

Q. [By Plaintiff's attorney] Well, did anything happen in October to cause you to fire [Plaintiff]?
A. For the fact of not performing his job.

Q. Well, are you telling us that your understanding is that [Plaintiff], in October of 1997, was not doing a good job as ward superintendent?
A. I think it is safe to say that for a long time [Plaintiff] was not performing his duties as ward superintendent as I expected him to do. (Carey Dep. at 30-31; See Def.'s Resp. to Pl.'s Add'l Factual Props. par. FIV.02.)

Plaintiff also claims that Carey's testimony lacks reliability because she did not mention during her deposition that Sanchez told her that Plaintiff was not driving the City van during working hours (Pl.'s Mem. at 8.) While the Court notes that Carey did testify that one of the areas that Plaintiff's performance was not measuring up was "garbage pickup," Plaintiff's attorney did not follow-up by asking Carey if she could recall if there were any other performance deficiencies, nor was Carey asked to exhaust her recollection on that subject. (Carey Dep. at 22-24; see Def.'s Resp. to Pl.'s Add'l Factual Props. par. FIV.02.) Therefore, the Court finds Plaintiff's argument to be unavailing.

Plaintiff further asserts that Carey could not remember any of the specific job performance concerns she had regarding Plaintiff during the months of June 1997 through September 1997 that caused Carey to terminate him on October 16, 1997. (Pl.'s Mem. at 7-8.)

The Court, however, notes that Plaintiff was not working during this entire period because he was on medical leave. (Def.'s LR56. 1(a)(3) St. par. 50.) Moreover, the Court notes that Carey was the Commissioner of the entire Department of Streets and Sanitation at the time, and the events at issue occurred more than four and one-half years before her deposition was taken. (See Def.'s Resp. to Pl.'s Add'l Factual

Props. par. FIV.03.)

Plaintiff contends that Carey's affidavit statement that she had decided, during the summer of 1997, to terminate Plaintiff was contradicted by Sanchez's deposition testimony. (Pl.'s Mem. at 8-9.) To the contrary, Sanchez testified that, while Plaintiff was on leave during the summer of 1997, Plaintiff's replacement, Krystiniak (Caucasian), did a much better job of running the Ward. (Def.'s LR56. 1(a)(3) St. par. 52-54.) Sanchez testified that he discussed the situation with Carey as well as the fact that they were disappointed with Plaintiff's performance. (Id. par. 55.) Furthermore, Carey and Sanchez also reached the conclusion, during the summer, that it was time for a change. (Id. par. 56.) The Court, therefore, finds that Sanchez's testimony is consistent with Carey's affidavit testimony that she made the decision to terminate Plaintiff's employment during the summer of 1997 and that Plaintiff was not terminated at the time because Carey was under the erroneous impression that such employment actions could not be taken while an employee was on leave. (Id. par. 57-58.)

Finally, Plaintiff asserts that he was terminated because he is a Caucasian employee who had been indicted. (Pl.'s Mem. at 6-7, 9-11.) Plaintiff contends that immediately after he was indicted, "City personnel requested that [he] resign from his position as Ward Superintendent." (Id. at 6.) Moreover, Plaintiff further asserts that he refused to resign and retained an attorney who wrote a letter (Pl.'s Resp. to Def.'s LR56. 1(a)(3) St., Ex. 3), on his behalf to Carey, requesting that his employment be protected while the criminal matter was pending. (Id.)

The Court finds Plaintiff's assertion that he was asked to resign after he was indicted also to be unavailing. First, Plaintiff has failed to produce and/or refer to the subject letter in any of his discovery responses or at his deposition. Second, the subject letter of Plaintiff's attorney is

contradicted by the testimony of Alderman Zalewski, the individual who supposedly asked him for his resignation after he was indicted. The subject letter of Plaintiff's attorney states that Plaintiff has "been advised by Alderman Zalewski that his resignation is requested because of a federal indictment returned last week that relates to [Plaintiff's] private security business." (Pl.'s Ex. 3, Oct. 15, 1997 Ltr. to Carey from Plaintiff's attorney). At his deposition, however, Zalewski testified as follows:

> Q: [By Plaintiff's attorney]: Do you have any reason to believe that [Plaintiff] was terminated because he had been indicted?
> A. [By Alderman Zalewski]: To be very honest, I don't know why he was terminated. I mean, I was never told why he was terminated. It wasn't my position to be told why he was terminated, so no, it had nothing--as far as I am concerned, you know, with his indictment--I don't know why he was terminated.

(Zalewski Dep. at 26.) Consequently, the subject letter Plaintiff references, which incidentally is inadmissible hearsay, does not, in reality, constitute evidence that Plaintiff's indictment played any part in his termination.[18]

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18. Plaintiff also claims that Carey's affidavit creates admissible evidence by way of a "negative pregnant." (Pl.'s Mem. at 11.) The Court, however, finds that the only thing Carey's affidavit establishes is that she never discussed Plaintiff's indictment with anyone in terms of the decision to terminate him. The fact that the City and Carey carefully state the facts does not create an inference that Plaintiff's indictment played any role in his termination. Moreover, Plaintiff did not pursue this issue at Carey's deposition.

Finally, relative to the pretext for race discrimination issue, Plaintiff has presented no evidence to contradict the "common actor" presumption of non-discrimination that applies to this case. Under Seventh Circuit case law, "... when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of nondiscrimination arises." *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 399 (7th Cir. 1997). Herein, the decision to hire Plaintiff was made by Carey in December of 1995. (Def.'s LR56. 1(a)(3) St. par. 15, 18.) Less than two years later, Carey was the ultimate decision-maker regarding Plaintiff's termination. (Id. par. 57, 59.) Additionally, the Court notes that all but one of the individuals even tangentially involved in Plaintiff's termination are Caucasian (the sole exception was Sanchez who is Hispanic), an indication which further points to the fact that Plaintiff's discrimination claim is baseless. (Id. par. 15, 16, 19-20, 31.) Therefore, the Court finds that Plaintiff has presented no evidence to overcome the common actor presumption.

The Court finds that the City has produced a legitimate, nondiscriminatory reason for terminating Plaintiff; namely, his poor performance and Plaintiff has failed to adduce any evidence demonstrating that the City's proffered reason is a lie or pretext for discriminating against him based on his race.

CONCLUSION[19]

Based on the foregoing, when viewing the evidence in the

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19. In view of the Court's ruling herein, it is deemed unnecessary to consider Plaintiff's and Defendant's other arguments raised herein.

Too, Plaintiff refers to his FMLA claim in his response memorandum. However, that cause having been previously dismissed by the Court, and a motion to

light most favorable to Plaintiff, a genuine issue of material fact does not exist and a fair-minded jury could not return a verdict for him on the evidence presented as it relates to his reverse race discrimination claim.

Accordingly[20] the City's motion for summary judgment is granted and the cause is dismissed with prejudice.

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reconsider that ruling having been denied, it is not necessary to address that claim further here.

20. Plaintiff's Motion to Strike is denied, except as to paragraph 21 of the City's statement.